United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7662

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-7662

B

JEROME J. WELLS,
EDWARD A. SWEETSER,
FRANCES M. BARBEAU,
WALTER HOLMES, CONRAD
MOORE, DAVID N.
O'CONNELL, LAURA MAY
NOYES, RONALD MILES
MAGONI, SHIRLEY A.
MARSH, ROBERT LEE BOOTH,
RAYMOND CHESTER LUCAS, JR.,
Appellants

v.

JAMES E. MALLOY,
Commissioner of Motor
Vehicles of the State
of Vermont,
Appellee

On Appeal from the United States District Court
for the District of Vermont

BRIEF OF APPELLEE

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ON THE BRIEF:

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STATEMENT OF THE CASE

The Appellee concurs with the Statement of the Case as stated by the Appellant in his Brief.

ARGUMENT I

I. THE STANDARD OF STRICT SCRUTINY IS INAPPLICABLE AS THE ENFORCEMENT OF 32 V.S.A. §8909 IS NOT A VIOLATION OF A CONSTITUTIONALLY GUARANTEED RIGHT AND DOES NOT CREATE A SUSPECT CLASSIFICATION.

At the outset we must decide whether or not to apply the strict scrutiny test in the case at bar. Where a statute burdens a fundamental right or draws a suspect classification, it must be able to withstand strict scrutiny in order to survive an equal protection challenge. In this instance there is no fundamental right. Although a driver's license is an important property right in this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense. However, a driver's license or the right to drive cannot be taken away without procedural due process of law. Bell v. Burson, 402 U.S. 353 (1971).

A case which is much in point to this controversy is that of San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 36 L. Ed.2d 16, 93 S. Ct. 1278 (1973), which stated clearly the prerequisites for the use of the strict scrutiny test in determining the constitutionality of state legislation. The Rodriguez case, supra, concerned a Texas school financing system based on local property taxation, and in setting forth the equal protection criteria the Court established the following framework:

> We must decide, first, whether the (legislative scheme) operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny *** If not, the (legislative scheme) must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the

Equal Protection Clause of the Fourteenth Amendment. (Idem 17)

United States v. Kras, 409 U.S. 434, 446 (1973), to which the Second Circuit refers as being supportive of the Appellee's position in the case at bar (Wells, et al v. Malloy, 510 F.2d 74) clearly requires one of two elements before the "lofty requirements of a compelling government interest" is demanded: either regulation of a fundamental right or creation of a suspect class. If neither is present the applicable test is that of rational justification.

Although Appellants point to language where the right to retain a motor vehicle license was characterized as "personal and fundamental" in the context of a due process decision, McNamara v. Malloy, 337 F. Supp. 732 (1971), the Vermont Supreme Court has held it to be a "privilege" (albeit one requiring due process considerations). Aiken v. Malloy, 132 Vt. 200, 206, 315 A.2d 488 (1974); State v. Muzzy, 124 Vt. 222, 224, 202 A.2d 267 (1964). Appellee respectfully argues that procedural due process is required before the termination of many important interests, whether the interest is "denominated a 'right' or a 'privilege.'" (Bell v. Burson, supra). However, not all such important interests are constitutionally guaranteed rights in the equal protection context.

In Rodriguez, supra, the Court clarifies the seeming confusion created by the use of the adjective "fundamental" in equal protection decisions:

> The Court today does not pick out particular human activities, characterize them as "fundamental" and give them added protection. ... To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." (Emphasis in original)

It has variously been held that such socially and economically important interests as education (Rodriguez, supra), decent housing (Lindsey v. Normet, 405 U.S. 56, 31 L. Ed.2d 36, 92 S. Ct. 862) and welfare benefits (Dandridge v. Williams, 397 U.S. 471, 25 L. Ed.2d 491, 90 S. Ct. 1153) are not explicitly or implicitly guaranteed by the Constitution for purposes of invoking strict scrutiny in equal protection analysis. It is therefore difficult to accept Appellant's assertion that a driver's license is a constitutionally protected fundamental right despite their allegation of a relation to the so-called right of travel (which appears to emerge from decisions based on questions of interstate migration and commerce. Shapiro v. Thompson, 394 U.S. 618, 22 L. Ed. 600, 89 S. Ct. 1322 (1969); U.S. v. Guest, 383 U.S. 745, 757-758, 16 L. Ed.2d 239, 86 S. Ct. 1170 (1966); Memorial Hospital v. Maricopa Co., 415 U.S. 250, 39 L. Ed.2d 306, 94 S. Ct. 1076 (1974).

It is alleged that the license suspension penalty of 32 V.S.A. §8909 creates a classification based on wealth, that is, those vehicle operators who owe the Purchase and Use Tax and those who do not. However, in the absence of showing that all members of the discriminated class are

completely unable to pay and as a consequence, suffer an absolute deprivation of the desired benefit (here retaining a driver's license), such a situation will not be held to be improper classification based on wealth. San Antonio Independent School District v. Rodriquez, supra, at Page 23.

Since there is no suspect class and no fundamental right involved, the applicable standards for measuring the propriety of Vermont's classification is whether there is a rational justification for the lines which have been drawn. U.S. v. Kras, supra, at 446.

The rational basis is readily apparent because the Purchase and Use Tax is a revenue collecting measure, and 32 V.S.A. §8909 is clearly designed to aid in the collection of the tax. Since losing one's right to drive is a great inconvenience, the potential loss operates as an incentive to make prompt payment. We do not understand Appellants to argue that Section 8909 is not effective. To the contrary, the fact that Wells brought this lawsuit indicates that he believes the Appellee's strategy to be too effective to ignore. Accordingly, it is suggested that there is a rational basis for suspending an individual's right to drive until he has paid any Purchase and Use Tax that he might owe.

32 V.S.A. §8909 is justified by Vermont's power to tax which is an inherent attribute of sovereignty. Bode v. Barrett, 344 U.S. 583 (1953).

ARGUMENT II

II. THE COLLECTION REMEDY PURSUANT TO 32 V.S.A. 8909 IS REASONABLY RELATED TO THE TAX INVOLVED AND IS NOT EXCESSIVE, ARBITRARY OR UNREASONABLE.

Where taxation is concerned, the states have broad discretion in making classifications and drawing lines which, in their judgment, produce reasonable systems of taxation, subject only to the rule that they not operate in an unreasonable and arbitrary manner. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 35 L. Ed.2d 351, 93 S. Ct. 1001 (1973).

The power to tax implies the power to enforce collection of taxes and necessarily, the State in its sovereign capacity, may prescribe the manner of collection. Pottock v. Mellott, 41 Del. 361, 22 A.2d 843 (1941); Brodhead v. Monaghan, 238 Miss. 167, 117 So.2d 881 (1960) and cases cited therein.

The general power to provide penalties to *** coerce the payment of taxes properly assessed, when related to legitimate purposes, is limited only in that such penalties must not be arbitrary, oppressive or unreasonable. Creigh v. Larson, (Neb.) 106 N.W.2d 187 (1960).

"Normally a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or preceived by the courts." U.S. v. Maryland Savings - Share Ins. Co. 400 U.S. 4 (1970); MacDonald v. Board of Election Commissioners, 394 U.S. 802 (1969).

The Appellant at page 21 of his Brief admits that the Purchase and Use Tax contributed to the highway fund, but then avers that the penalty imposed by 32 V.S.A. §8909 is unrelated to the tax involved. The Appellee respectfully submits that this contention is without merit and in support thereof, sets out the pertinent provisions of Title 32 relating to the use and distribution of the funds collected by the imposition of the Purchase and Use Tax.

§8901. Purpose

> This is an act to impose a purchase anduse tax on motor vehicles in addition to any other tax or registration fees. The purpose of this chapter is to thereby improve and maintain the state and interstate highway systems, to pay the principal and interest on bonds issued for the improvement and maintenance of those systems and to pay the cost of administering this chapter.

§8912 Allocation of funds

> The taxes collected under this chapter shall be paid into and accounted for in the highway fund.

It is evident from the pertinent provisions of the above statutes that the revenues derived from the Purchase and Use Tax are used exclusively for highway-related purposes benefiting all highway users.

Recognition of the need for a small margin of under inclusion or over inclusion, in the framing and enforcement of legislation, especially in the tax area, has been recognized by the courts. Euclid v. Ambler Realty Co., 272 U.S. 365, 388-389, 71 L. Ed. 303, 47 S. Ct. 114 (1926); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 37 L. Ed.2d 782, 93 S. Ct. 2821 (1973); McGinnis v. Royster, 410 U.S. 263,

35 L. Ed.2d 282, 93 S. Ct. 1035 (1973).

In support of his contention that the tax involved is excessive, arbitrary and unreasonable, the Appellant cites the case of Parish v. East Coast Cedar Co., 45 S.E. 768, (N.C. 1903). In this case the court struck down a statute allowing total forfeiture of land without sale and distribution of proceeds for non-payment of real estate taxes on the land.

Wilson v. McKenna, 52 Ill. 43 (1869), is not in point. There a statute was struck down which barred landowners from bringing suits against interference with their possossory interest unless they had paid all taxes.

None of these cases cited by the Appellant bearing on penalty provisions being arbitrary, unreasonable or excessive bear any similarity to the case at bar.

In the case of Earnhart v. Heath, 369 F. Supp. 259 (E.D. Ark. 1974), the bulk of the revenue raised by the assessment went to public education, rather than improvement of the highways. Even though the tax obligation and the use of the money raised was not closely related to the use of automobiles, the State could still refuse to register motor vehicles to compel payment.

In Bieling v. Malloy, 133 Vt. No. 229-74 (Oct. 1975), the Court upheld the constitutionality of 23 V.S.A. §604 which empowers the Commissioner of Motor Vehicles to suspend the motor vehicle operator's license of those individuals who fail to pay their poll taxes. The poll tax becomes part of the general funds which support all

of the local functions of a municipality. As such, the use to which the tax is put is far broader in scope and less relevant to motor vehicle operation than the Purchase and Use Tax in the instant case, although in Bieling, supra, the court notes that general town taxes usually contain a highway tax within them. In sustaining the constitutionality of §604, the Vermont Supreme Court points out that the problem is not one involving motor vehicle operators, but rather one of the taxing authority of the state together with the power of the sovereign to bestow and withhold a privilege. The withholding of an operator's license for non-payment of poll taxes is a reasonable and valid exercise of the state's power to assure that citizens who share the benefits of government likewise share its burdens.

CONCLUSION

The Appellee respectfully prays that this Court affirm the decision of the United States District Court for the District of Vermont.

Respectfully submitted,

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